No. 95-1231

Supreme Court, U.S.
FILED
SEP 6 1995
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LILLIAN BROWN JOHNSON

Petitioner

vs.

THE STATE BAR OF CALIFORNIA

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

LILLIAN BROWN JOHNSON
P. O. Box 19-1191
Los Angeles, California 90019

1-310-826-2180

Petitioner Attorney *Pro Se*

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S0469247
SBC: 86-0-12794

SUPREME COURT
FILED
AUG 10, 1995
Robt Wandruff Clerk
DEPUTY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

IN THE MATTER OF LILLIAN BROWN JOHNSON ON DISCIPLINE

"Petition for disqualification," etc., and petition for writ of review are denied.

It is ordered that Lillian Brown Johnson be suspended from the practice of law for five years, that execution of suspension be stayed, and that she be placed on probation for five years on condition that she be actually suspended for two years and until she has made restitution to the estate of Margie Brown (or the Client Security Fund, if appropriate) in the sum of $20,550, plus 10% per annum from October 14, 1986, and until

she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. She is further ordered to comply with the other conditions of probation recommended by the Review Department of the State Bar Court in its opinion filed January 23, 1995. It is also ordered that she take and pass the California Professional Responsibility Examination during the period of her actual suspension. (See Segetti v. State Bar (1976) 15 Cal.3d 878, 891, fn. 8.). She is further ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisons[sic] (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar and shall be added to and become part of the membership fee for the next calendar year. (Business and Professions Code section 6140.7.) See Business and Professions Code section 6126, subdivision (c).

Lucas
Chief Justice

STATE STATUTES

THE STATE BAR ACT

California Business and Professions Code

SECTION 6001. STATE BAR; PERPETUAL SUCCESSION; SEAL; REVENUE; POWERS; LAWS APPLICABLE

The State Bar of California is a public corporation. It is hereinafter designated as the State Bar.. . .No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with section 11000), Division 4 (commencing with section 16100), and Part 1 (commencing with section 18000) and Part 2 (commencing with section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the legislature expressly so declares. (Origin: State Bar Act, sec. 2. added by Stats. 1939, ch 34. Amended by Stats. 1957, ch. 1526; Stats. 978, ch. 380; Stats. 1988, ch. 1149.)

SECTION 6079.1 STATE BAR COURT HEARING JUDGES

(a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. .. (c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, and submit its nominations to the Supreme Court, unless otherwise directed by the Supreme Court. . .

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities.

SECTION 6079.5 CHIEF TRIAL COUNSEL; APPOINTMENT; TERM; QUALIFICATIONS

(a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. . .

SECTION 6086.5 STATE BAR COURT; ESTABLISHMENT; POWERS; RULES

The board of governors shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of section 6007 to the extent provided by rules adopted by the board of governors pursuant to this chapter.

SECTION 6086.10 PAYMENT OF COSTS OF DISCIPLINARY PROCEEDINGS

(a) Any order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs.

(b) The costs required to be imposed pursuant to this section include all of the following:

(1) The actual expense incurred by the State bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the services of the reporter.

(2) All expenses paid by the State Bar which would qualify as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be "reasonable costs" of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for the services of attorneys or experts, of the State Bar in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceedings and in the administration of the client security fund...

(d) In the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State bar in the amount determined by the State bar to be the reasonable expenses, other than fees for attorneys or experts, of preparation for the hearing. (Added by Stats. 1986, ch. 662.)

SECTION 6086.13 IMPOSITION OF MONETARY SANCTION IN DISCIPLINARY MATTER .

(a) Any order of the Supreme Court imposing suspension

or disbarment of the member of the State Bar, ...may include an order that the member pay a monetary sanction not to exceed five thousand dollars ($5,000) for each violation, subject to a total limit of fifty thousand dollars.

(b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.

....

(d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or sanctions....

SECTION 6106 MORAL TURPITUDE, DISHONESTY OR CORRUPTION IRRESPECTIVE OF CRIMINAL CONVICTION

The commission of any act of moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

SECTION 6140.7 DISCIPLINARY COSTS ADDED TO MEMBERSHIP FEE

Costs assessed against a publicly reproved or suspended member shall be added to and become a part of the membership fee of the member, for the next calendar year. Costs unpaid by a member who resigns with disciplinary charges pending or by a member who is suspended of disbarred shall be paid as a condition of reinstatement of membership.

SECTION 6211. DEFINITION OF FUNDS TO BE DEPOSITED IN INTEREST BEARING DEMAND TRUST ACCOUNT; INTEREST EARNED PAID TO STATE BAR; OTHER ACCOUNTS OR TRUST INVESTMENTS; RULES OF PROFESSIONAL CONDUCT; DISCIPLINARY AUTHORITY OF SUPREME COURT OR STATE BAR

(a) An attorney or law firm, which is the course of the practice of law receives or disburses trust funds, shall establish and maintain an interest bearing demand trust account and shall deposit therein all client deposits that are nominal in amount or are on deposit for a short period of time. All such client funds

may be deposited in a[n].unsegregated account. The interest earned on all such accounts shall be paid to the State Bar...

CALIFORNIA RULES OF PROFESSIONAL CONDUCT; FORMER RULE 5-101: "A member shall not enter into a business transaction with a client...unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, 2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and 3) the client consents in writing thereto. "

FORMER RULE 8-101(A): "All funds received or held for the benefit of clients by a member... shall be deposited in one or more identifiable bank accounts labelled (sic) "Trust Account... (B)(4): "A member of the State Bar shall ...promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive."

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON,

Petitioner,

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

Respondent.

No. S046247

(St., Bar Ct., No. 86-O-12794)

PETITION FOR REVIEW OF DECISION

SUPREME COURT

FILED

JUN'27

Robert Wandruff Clerk

DEPUTY

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In Propria Persona

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON,

Petitioner,

NO. S

(St. Bar Ct. No. 86-0-12794)

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR REVIEW OF DECISION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 28 of the California Rules of Court, petitioner, LILLIAN B. JOHNSON, respectfully requests that this Court review the opinion of Review Department and its

summary denial of petitioner's Motion for Reconsideration, Supplement to Motion For Reconsideration, and Amendment to Supplement to Motion for Reconsideration. Copies of the State Bar Court of the State Bar of California denials dated March 6, 1995, March 21, 1995, and June 19, 1995, respectively, are attached hereto as Exhibits H, I, and J.

Review is sought pursuant to Rule 29(a) of the California Rules of Court, to settle important questions of law.

ISSUES ON REVIEW

In order for the State Bar Court to be legally in a position to find culpability under Rules 5-101 and Section 6106 of the State Bar Rules of Professional Conduct, the accused attorney must be legal notice of the prohibitive conduct these rules strike. It is necessary to settle this important question of law.

The evidence submitted in support of a finding that the accused attorney violated Rule 8-101 is legally insufficient and fails both the competent and "clear and convincing" tests. Accused attorney is denied due process of law because accused attorney's hearing was heard by a solo judge who did not reveal

his financial interests in the outcome of the hearing.

Chief Trial Counsel (prosecutor) did not reveal his/her financial interests in the outcome of the hearing.

The evidence does not support the decision, and does not meet the standard test of "clear and convincing" with all reasonable doubts resolved in favor of the accused.

The State Bar Court published its advisory decision on January 25, 1995, in the Daily Journal Appellate Report which prejudicial publication denies accused attorney's right to a fair review before the State Supreme Court.

Accused attorney is a registered voter and a licensed member of the State Bar of California, is denied her right to vote and select the nine (9) judges which are appointed by the State Supreme Court Justices which forces an attorney to forfeit her right to vote in order to be licensed by the State Supreme Justices. The State bargaining one right in order to have another denies due process of law to the accused attorney.

The accused attorney is denied equal protection of law when she is not subject to any of the protection afforded other

professionals in state-disinterested prosecutors, hearing persons, persons subject to control by the Judicial Commission, the Judicial Code, the Judicial Council and the prohibition on inflammatory pre-hearing/review releases issued by the State Bar Court.

The recommended discipline is excessive and inappropriate in light of the record as a whole.

NECESSITY FOR REVIEW

On September 23, 1992, hearing in this matter was commenced in the hearing department of the State Bar Court. On June 28, 1993, said hearing was concluded. On March 26, 1994, petitioner filed an opening brief in the review department of the State Bar Court. On June 29, 1994, petitioner made oral argument before the review department of the State Bar Court. That at the close of said argument, the Court granted petitioner leave to file an Additional Trial Argument" brief. That petitioner filed a Respondent's Brief on July 28, 1994. That Trial Counsel filed a "Response." That on September 9, 1994, petitioner filed an opposition to Motion to Strike filed by the Trial Counsel.

That petitioner filed a Petition for An Order to Augment or Correct Record on Appeal on September 10, 1994. That Trial Counsel filed a Response to Supplemental Declaration to Petition for An Order to Augment or Correct Record on Appeal on September 30, 1994. That the review department of the State Bar Court filed its opinion on Review on January 23, 1995. That petitioner filed a Notice of Motion and Motion For Reconsideration of Review Department's Decision, etc., on February 3, 1995. [Cal. Rules of Ct., Rule 3(a), (b)]. That the Trial Counsel filed Opposition to Motion for Reconsideration on February 21, 1995. The Review Department filed its ruling denying Motion for Reconsideration on March 6; denied the Supplement to Motion for Reconsideration on March 21, 1995.

The threshold issues here are whether petitioner is denied due process of law under both the United States and State Constitutions by and through the Fourteenth Amendment.

The accused attorney has been denied due process of law under the following:

1. That a solo justice sitting alone as hearing judge failed

to disclose that he had a financial interest in the outcome of the hearing. The hearing was not conducted by an impartial hearing judge.

2. The Chief Trial Counsel (prosecutor) failed to disclose his financial interests in the outcome of the hearing.

3. Evidence upon which a decision rests is not competent and does not meet the "clear and convincing" standard to satisfy the right of fair hearing.

4. Accused attorney is a registered voter and as a licensed attorney, the State Supreme Court Justices appointed nine (9) State Bar court "judges" and the State Bar Board of Governors, who selected the prosecutors, has forced accused attorney to forfeit her right to vote to create the courts and elect and remove their judges, denies accused attorney due process of law.

5. Accused attorney is not given legal notice of prohibitive conduct by the language contained in rules 5-101 and 8-101 and section 6106; culpability cannot constitutionally sustained pursuant to language contained therein.

6. The State Bar Court published a decision on January 25,1995, that accused attorney had been tried in said court and finds the accused attorney committed violation under rule 5-101 and section 6106, etc. constitutes a denial of accused attorney's right to a fair and impartial review on this matter before the Justices of the State Supreme Court.

7. The accused attorney is denied equal protection of laws when she is not subject to any of the protection afforded other professionals in state-disinterested prosecutors, hearing persons, persons subject to control by the judicial Commission, the Judicial Code, the Judicial Council and the prohibition on inflammatory pre-hearing/review releases issued by the State Bar Court.

8. The factors in mitigation, pro bono services should be considered.

9. The recommended discipline is excessive and inappropriate in light of the record as a whole.

ARGUMENT

I.

WHETHER THE STATE OF THE EVIDENCE SUPPORTS VIOLATIONS OF RULE 5-101 AND SECTION 6106 AND WHETHER LANGUAGE CONTAINED THEREIN IS CONSTITUTIONALLY LEGAL.

Former Rule 5-101 reads as follows:

A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed [and]transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

The United States Constitution, Fifth Amendment and the

Fourteenth Amendment which makes these amendments applicable to the states guarantees a right of legal notice of the prohibitive conduct. Petitioner takes the position that the above-cited rule does not give legal notice. The language contained therein is ambiguous and overly broad. The use the term "business transaction". The attorney in representing clients is required by State Bar Canons to enter into a contract be it oral or written for whatever representation the client will receive from the attorney under terms and conditions. This is a "business transaction". Therefore, the term "business transaction" is ambiguous and overly broad. With respect to the term "pecuniary interest adverse to a client. . . .", this term is ambiguous and seems to include even the transactions where the attorney represents a client on a contingency basis. Where the client has suffered an automobile accident and the insurance company is slow settling the case, the attorney first of all enters into a contract with the client and the contract generally provides for attorney's fees at one-third (1/3) per cent, forty (40) per cent, or in some instances, fifty (50) per cent of the gross recovery. In

this case the petitioner testified that petitioner had telephone conferences during the week of September 15, to September 19, 1986, with the client regarding the loan agreement and its terms. [R.T. Vol. VII, 67:18-25]. [Reporter Transcript, Volume No. VII, page 67, lines 18 through 25]. The record is void of any testimony from a witness called by the Trial Examiner that said telephone conferences did not occur. The writing, petitioner's Exhibit B, reflects the terms of said telephone conferences as memorialized. The rule appears on its face to impose "strict liability" upon a violator.

Assuming arguendo, that the above-cited rule is not unconstitutionally vague, ambiguous, or overbroad, petitioner contends that she has satisfied the elements of the rule; to wit: petitioner had conferences with client during the week of September 15 through 19, 1986. We discussed fully the terms of the "Agreement." The agreement was fair and reasonable under the circumstances existing in that time frame. The petitioner had an accounts receivable in the approximate amount of $100,000. The client was in communication with petitioner as stated.

Certainly, the client consented in writing as reflected in Exhibit "B". Federal and state statutes are well-settled, and there is a vast body of law which has interpreted statutes and case law, and it is crystal clear that every conviction under a statute which is vague, ambiguous, and overbroad on its face or as applied to the "prohibitive conduct" is constitutionally void.

Section 6106: Moral Turpitude

> The act of baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general, contrary to accepted and customary rule of right and duty between man and man. State v. Adkins, 40 Ohio App.2d 473, 320 N.E.2d 308, 311 69 0.0.2d 416. The quality of a crime involving grave infringement of moral sentiment of the community as distinguished from statutory mala prohibits. Black's Law Dictionary, Sixth Ed., pp. 1008, 1009

The language contained in the definition of one possessing a lack of "moral turpitude" is ambiguous and overly broad. Because of such a broad-sweeping concept of what constitutes a

lack of moral turpitude, any act that is considered against a code of conduct, may be deemed an act that constitutes a lack of moral turpitude. The person is not put on legal notice of any specific act or acts that are prohibited by such a broad sweeping definition.

In the instant case, the review department contends that petitioner engaged in overreaching in entering into a "business transaction" with her client. The question become whether overreaching occurred at the time the contract was entered into by the parties, or is overreaching determined on subsequent changes in petitioner's financial reverses. Petitioner testified that petitioner's client was cashed on the date the "Agreement" was executed. The testimony the Trial Examiner presented on that issue was the testimony of Sandra Brown, "Did your mother tell you that Lillian Johnson gave her $700." [R.T., Vol. IV, 150:3-5, 8-101. No violation occurred.

II.

WHETHER PETITIONER IS DENIED DUE PROCESS OF LAW BY REASON OF SOLO "HEARING PERSON'S" FINANCIAL INTERESTS IN THE OUTCOME OF HEARING.

On September 23, 1992, a hearing in this matter was commenced. That said hearing phase of this matter concluded on June 28, 1994. That hearing person was Christopher W. Smith, appointed by the Justices of the State Supreme Court. That said hearing person's compensation (salary) is paid from the costs imposed upon attorney's who either "buy out" or his found guilty in his matter. That the law is clear in order to remove any semblance of a conflict of interest, there must be a disclosure of an interest in the proceedings a "hearing person" [State Bar Court Judge] hears and the accused attorney must be afforded an opportunity to waive the judge's conflict of his financial interests in the outcome of the hearing. That his salary is paid from the costs imposed by the "hearing person". That the State Supreme Court Justices have authority to fix the compensation of the

"hearing person" judges of the State Bar Court which was created as a subordinate to the State Supreme Court. The Trial Examiner [Chief Trial Counsel] deputy never disclosed her financial interests in the outcome the hearing, nor did she give petitioner an opportunity to waive in writing conflict of interest that clearly exists. That these facts were not known to petitioner at the time of the hearing and petitioner just recently became aware of said facts.

III.

WHETHER PETITIONER IS DENIED DUE PROCESS BY REASON OF HER RIGHT TO VOTE TO CREATE COURTS, ELECT AND REMOVE JUDGES

The United States Constitution has guaranteed to the residents of the state the right to vote. Said right is secured to the registered residents of the states through the Fifteenth Amendment. The State Bar Association, which is a private party, created the State Bar Court, through its Board of Governors. That said State Bar Court is presided over by judges who

appointed by the State Supreme Court Justices. That petitioner as a registered voter and compelled member of the State Bar Association has been forced to forfeit her right to create the courts, elect and remove their judges. Thus, the State bargaining off one right in order to have another denies petitioner due process of law. State Bar Court are not subject to the authority of the Judicial Council, Judicial Committee, nor the Judicial Code of Conduct. That at the hearing the judge permitted the Trial Examiner to introduce graphic evidence of client's physical injuries sustained in the accident on March 13, 1982. [R.T. IV, p. 135:22-25, p.136:1-25, p.137:125, p. 138:5-25, p. 139:8-251. This item of evidence is extremely inflammatory and did not go to any issue presented by the Notice to Show Cause dated October 7, 1991, but was presented for the purpose of appealing to the sympathy, emotions, prejudices and biases of the judge. Had the judge been elected by the vote or by process of the executive branch of government, he would not have received said evidence. In addition, the recount of these statements of the accident of 1982 at the least appealed to the sympathy, prejudices

and passions of the trier of fact. It flies in the face of human reasoning that such an account of the accident, coupled with the financial interests, would not have any effect on the trier of fact in influencing his decision. The bell of sympathy and passion had been rung over petitioner's objections and could not be "unrung".

IV.

WHETHER PETITIONER HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS.

The equal protection of the law means that equal protection and security shall be given under all under like circumstances in his life, his liberty, and his property, and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances. **Sovereign Camp W.O.W. v. Casodos**, D.C.N.M., 21 F. Supp. 989, 944.

> No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property, and in pursuit of happiness.

Connolly v. Union Sewer Pipe Co.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431.

There is no equal protection of law in hearings which are conducted by financially interested judge. Because of the financial needs of the judge take precedent in determining the decisions, not the alleged misconduct, facts, evidence, nor the law. The state bar rules lack minimum due process of law and equal protection of law abrogating the fair trial constitutional requirements express in Sheppart v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507. Petitioner directs the Court's attention to the fact that the "Review Department" published a statement "Recommendation" in the Daily Journal (1/25/95), D.A.R.1058, setting forth its "alleged findings". That the publication was inflammatory in that it stated that petitioner had violated Rule 5-101, Section 6106, and 8-101 and stated of alleged facts supporting its conclusion. Such publication its conclusion. Such publication was made "under color of the State Bar Court".

In the case entitled McCartley v. Commission on Judicial Qualification (1974)116 Cal.Rptr.260, 526 P2d 268, 12 C3d 512, the judge who was investigated by the Commission to determine his fitness to sit, was found to be undesirable to continue sitting

by the Commission. However, these findings could be published without the written consent of the judge being investigated. Petitioner was not given an opportunity to consent to said publication. Additionally, other professions are afforded protections which are not subjected to attorneys.

V.

WHETHER PETITIONER IS IN VIOLATION FORMER RULE 8-101(B)4.

This requires an attorney to promptly pay over to or deliver to the client, upon the client's demand, property in the attorney's possession to which the client was entitled. This rule by its language and intent characterizes funds after the funds are deposited in a trust or client's funds account. It is extremely crucial to bear in mind that at the time the subject funds were deposited in the personal account of petitioner, the funds had acquired a different character. The only evidence in the record to refute the character of the funds at the time deposited is Sandra Brown's testimony, "Okay. Did your mother ever tell you that Lillian gave her $750 in cash sometime in 1986?" [R.T., Vol. IV,

150:3-4). Petitioner testified, "So you paid her [Client] $700 before . . . ? That's correct." [R.T., Vol. II, 16:7-81. All reasonable doubts affecting an item of evidence should be resolved in favor of the accused.

VI.

WHETHER THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE DECISION/RECOMMENDATION HEREIN.

It is well-settled by statute and case law that a decision/judgment must be supported by some legal evidence tending to prove every material fact in issue as to which the party in whose favor the decision/judgment was rendered had the burden of proof.

As in the case at bar the Trial Examiner had the burden of proof by "clear and convincing" evidence on all elements of misappropriation that the sum of approximately $20,000 had been misappropriated. Through witness Sandra Brown, the Trial Examiner attempted to demonstrate to the Court that [Client] was probably intoxicated on September 19, 1986, the day [Client)

came to petitioner's office and signed Agreement dated September 19, 1986. [Exhibit B]. [R.T., Vol. II, 152:525,153:9-181. Witness Lucerne Middlebrook testified, "Okay. From the period 1985 through the time that Margie Brown died, how often would you see Ms. Brown? Let's say, how many times a month would you see Ms. Brown? I saw her every day. [R.T., Vol. V, 16:12-181. Trial Examiner did not present any medical reports nor psychiatric reports of the "alleged alcoholism" that the [Client] may have been suffering from. There is no testimony offered that [Client] was intoxicated on the date of September 19, 1986.

Additionally, petitioner invites the Court's attention to the case entitled Keithley v Civil Service Bd. (1970), 11 C.A.3d 443, 89 Cal.Rptr. 809. The facts involved a police officer who had worked on a day shift which terminated at 3:30 p.m. The officer was called to the patrol division desk at 6:00 p.m. Once there the officer was kept waiting until 11:00 p.m. when he was told to report to homicide division where he was informed that he had been charged with a serious crime. After being advised of his

rights, he was interrogated and during the interrogation he was told that he had been charged with the crime of rape of a woman who was staying with him and his wife. The interrogation concluded at 2:00 a.m. and he was told to return the next day at 8:00 a.m. The police officer feared that his wife would leave him if the matter was published so [he] resigned. There is no evidence that petitioner engaged in any conduct that comes close [to] the facts of the above-cited case in an attempt to obtain a loan from [Client].

VII.

ARGUENDO, IF THE RECOMMENDATION CAN BE SUPPORTED BY THE EVIDENCE, THE RECOMMENDED DISCIPLINE IS EXCESSIVE AND ERRONEOUS.

Assuming for the sake argument, that the decision is supported by creditable, reasonable, and evidence of a solid value, the petitioner takes the position that the recommendation is extremely has and excessive in the instant case. Petitioner respectfully directs the court's attention to the case entitled

Clarence E. Blair v. The State Bar of California (1980), 27 C.3d 407, 612 P.2d 924. In 1974, petitioner was retained by Michael Hayes to litigate a personal injury claim. The case was settled for $9,250 and on January 9, 1976, petitioner received and deposited the settlement funds in his client's trust account. On January 15, 1976, petitioner paid to Hayes $3,389.97 from the settlement funds and agreed to pay from the remainder of the funds various obligations (medical expenses and legal fees owing to another attorney).

In addition the evidence showed that during the period from January 15, 1976, to October 13, 1977, petitioner's trust account had dropped below the amount entrusted to petitioner by Hayes. Client's trust account was used for other than payment to petitioner for earned attorney's fees and costs. The board found that petitioner wilfully misappropriated funds and commingled funds.

Petitioner's prior disciplinary record revealed that petitioner in May,1975, petitioner settled a matter for his clients, Ms. and Mrs.John Hall, petitioner paid a portion of the settlement

to the Halls and acting with the Halls' consent, retained the balance to pay certain medical bills. However, the medical bills were not paid until after the Halls complained to the State Bar. The board found petitioner had failed to pay these bills until August, following the State Bar inquiry regarding the Halls' complaint. In addition, the board found that petitioner had negligently commingled the Halls' funds with other clients' funds and also negligently misappropriated the Halls' funds by allowing his trust account balance to fall below the amount held on behalf of the Halls.

The court held that the board's recommendation was appropriate. It ordered the petitioner be suspended from the practice of law for two years on conditions of probation, including an actual suspension of six (6) months and other standard conditions.

A comparison the facts in the above-cited case, they are similar in that the [Client] in the instant case before the Court received a portion of the settlement funds, to wit, on September 19, 1986, she was cashed out in the sum of approximately $800

and during the years from 1987 to mid-1988, paid approximately $1,000. The instant case involved a settlement from a personal injury matter.

The facts in the case at bar are dissimilar in that the [Client] was related to the petitioner. There existed between [Client] and petitioner a close relationship which was sustained in excess of thirty-eight (38) years. The facts in the cited case authority state that the petitioner therein had suffered a prior disciplinary proceeding for the same type of misconduct in May, 1975. The petitioner has practiced twenty (20) years and has not suffered a prior disciplinary proceeding. Although the charge of misappropriation of funds is a serious one, the rule and application of discipline recommended in the Blair case should be applied with a modification of six months suspension and an actual thirty-30 day suspension.

Further, the petitioner invites the Court's attention to the case entitled William Waysman v. State Bar of California (1986), 41 C.3d 452, 244 Cal.Rptr. 476,749 P.2d 331. This case involved

the following set of facts: petitioner was admitted to practice law in 1970. The petitioner practiced law for 12 years and in April, 1982, he formed a two-attorney partnership which was in existence for approximately three weeks. The petitioner's partner left the partnership, leaving the petitioner as sole attorney to handle 150 lawsuits that had been assigned the partnership by its client, the David Janison Carlyle Corporation and its subsidiaries and related companies. One of the cases involved the claim of subsidiary Environmental Investments against its insurance carrier. On or about May 27, 1982, insurance carrier issued a draft in the amount of $24,00, payable to "William H. Waysman, Attorney for E & I and Continental Associates, in full settlement of the claim." Petitioner instructed his secretary to inform the client that the settlement draft had been issued and [t]hat the secretary was to further secure the appropriate signature on the release. Petitioner several days later instructed the secretary to deposit the draft in his trust account. The draft was so deposited and the secretary notified petitioner that the draft would not be cleared for three weeks. The petitioner ordered the secretary to

retrieve the draft and redeposit it in his law office account where it would clear in seven days.

When petitioner returned, he found that the secretary had quit, having used a set of presigned checks from the office account to pay various expenses and salaries (including her own and that of her husband, a law clerk). Petitioner had incurred heavy expenses from the trial and had written other checks from the office account. Meanwhile, he had been in a series of complicated banking transactions which contributed considerable confusion as to the amount available in his office account. The entire $24,000 was spent. Petitioner retained a certified public accountant to assist him, but because he did not have funds to pay for this service, an audit was never completed. Petitioner advised Environmental Investments that its settlement funds had been spent. He began making restitution approximately five months later. In July, 1983, petitioner executed a promissory note to Environmental Investments in the amount of $24,000 at a rate of 10 percent, due December 31, 1984, subject to a six-month extension. At the time of the misappropriation, petitioner

was dependent on alcohol, apparently a result of a bitter divorce in 1979. He had for several years been under the counseling of a psychiatrist who now attributes the petitioner's poor judgment in handling his client's funds to his alcohol problem. Petitioner appears to have an extreme reaction to small amounts of alcohol which causes him to lose his sense of judgment and to become very confused.

In May, 1983, proceedings were commended against petitioner. Petitioner and State Bar examiner entered into a stipulation of facts and an agreed upon discipline, to wit, petitioner be suspended from the practice of law for one year, that execution of the suspension be stayed, and that petitioner be placed on probation for one full year subject to specific condition, including that he make restitution of $24,000 at 10 percent per annum.

In April, 1984, the Review Department of the State Bar Court rejected the stipulation on the ground that the discipline "appears excessive in view of the stipulated facts, and that it "fails to set forth the time within which [petitioner] must make restitu-

tion.

In August, 1984, the parties entered into a second stipulation which the Review Department subsequently approved. This time, the discipline included suspension from practice for six months, a stay of suspension, and probation for one year on specific conditions. The conditions during the probationary period included that petitioner make full restitution by December 1984, (subject to a six-month extension) at the rate of 10 percent per annum; that the petitioner be assigned a probation monitor referee; that he abstain from the use of intoxicants; that he remain enrolled in Alcoholics Anonymous and be an active member of the State Bar (or other) rehabilitation program for alcohol abuse. The court imposed the recommendation of the Review Department as its decision.

The facts of the case at bar similar in that the petitioner was in an "association" with another attorney for a period of time. However, during the years 1987 the "association" was very stressful, in that, there were disputes over client referrals. Also, petitioner's clientele in 1988 and shortly thereafter became non-

existent. That the loss of clientele forced petitioner to close her office. The amount involved in the present is less than the amount in the cited case. In the Waysman case the draft was deposited in the personal "law office account" of the petitioner and the only explanation was that the "clearing period" would be one week, as opposed to three weeks. In the present case, the settlement check was wired directly to petitioner's personal account because petitioner had cashed out [Client] approximately two weeks before the transmission of the check. Additionally, petitioner believed based upon Exhibits A and B and conversations had with the [Client] during the week of September 15 through 19, 1986, the funds had changed character and had become the personal property of petitioner. That the promissory note was unsecured as the promissory note in the Waysman case. Petitioner feels that the present case at bar warrants the same degree of discipline as granted in the Waysman case with exception that actual thirty-30 day suspension. [See petitioner's Exhibit A.]

///

FACTORS IN MITIGATION

Petitioner respectfully moves the Court to consider the fact that the [Client] filed a written complaint with the State Bar in June, 1990. That Notice to Show Cause was filed by the office of Trial Counsel on October 7, 1991. The OTC was advised there was in existence a "Note Straight" which had been given to [Client] in October, 1990. However, no effort was made by the OTC to take the deposition of [Client] nor is petitioner aware of any statements [Client] made regarding said note. Petitioner was deprived of an opportunity to review this evidence which may have led to identity of other possible witnesses as to the whereabouts of the original of the note. The [Client] did not die until January 8, 1992.

Petitioner has worked as a volunteer attorney assisting low-income "pro per" clients in the area of filing domestic violation proceedings, simple divorces, guardianships, adoptions,and restraining orders. Petitioner commenced working for the Harriett Buhai Family Law Center in December 27, 1984, and has continued until April, 1994. [Exhibit next in order].

Petitioner has been licensed to practice law for approximately twenty (20) years and no prior disciplinary proceedings have been filed against her.

VIII.

CONCLUSION

Based upon the foregoing, the record does not contain the state of evidence by a clear and convincing standard as to all material facts to support the charges so alleged. Therefore, the State Bar Court has failed to meet its burden of proof. Petitioner respectfully requests that the [matter] be remanded to the Hearing Department for a hearing de novo as to all charges before this Court.

Dated: June 23, 1995. Respectfully Submitted,

LILLIAN B. JOHNSON
In Propria Persona

VERIFICATION

I, LILLIAN B. JOHNSON, am the petitioner in the within proceedings and I have read the foregoing and know its

contents. The matters stated therein are true of my own knowledge, except as to those matters stated on information and belief, and as such matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 23rd day of June, 1995, at Los Angeles, California.

LILLIAN B. JOHNSON
Declarant

THE SUPREME COURT OF THE STATE OF

CALIFORNIA

IN RE LILLIAN BROWN JOHNSON, NO. S046247

Petitioner, (St. Bar Ct. No. 86-0-12794)

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIPORNIA, JUL 24, 1995

Respondent.

PETITION FOR DISQUALIFICATION AND REMOVAL OF JUSTICES AND APPOINT DISINTERESTED COURT OF APPEALS JUSTICES TO HEAR AND MOTION TO DECLARE STATE BAR COURT STATUTES, RULES, REGULATIONS AND STANDARDS UNCONSTITUTIONAL

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In Propria Persona

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON, 46247 *NO- SO*

Petitioner, (St. Bar Ct. No. 86-0-12794)

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THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Code of Civil Procedure, Section

170.1 et. seq , petitioner, LILLIAN B. JOHNSON, respectfully moves this Court for a recusal order in the pending matter before this Court. That petitioner cannot secure a fair and impartial hearing in the Petition for Review of Decision filed herein.

ISSUES

The accused attorney cannot secure a fair and impartial hearing because the Court is biased and/or prejudiced against a nonparty witness during the evidentiary phase of the proceedings.

The hearing Judge, trial examiner, nor the investigators disclose their financial interests in the outcome of the proceedings.

ARGUMENT

I.

WHETHER SUPREME COURT APPOINTED HEARING JUDGE IS BIAS AGAINST A NONPARTY WITNESS FOR PETITIONER WHICH MAKES IT IMPOSSIBLE FOR PETITIONER TO SECURE A FAIR AND IMPARTIAL HEARING BEFORE THIS COURT.

Bias. inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline one side. Condition of mine, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. [See state ex rel. Mitchell v. Base Stores Co., 157 Kan. 622, 143 P.2d 652, 655.1Black's Law Dictionary, Sixth Edition, P. 162.

During the evidentiary phase of the proceedings at the State Bar Court, the Judge "cross-exainilqied a nonparty witnessf Mrs. Ionia Alexander as follows:

THE COURT: A lot of people see people writing names. Just seeing it isn't enough. What other, if any -- is there anything else that you can tell this court that would cause this Court to believe what you're saying?

MS. JOHNSON; Your Honor, I'm going to object to the line of questioning, Ycu're calling for the witness to speculate as to what the Court is to believe or disbelieve.

THE COURT: Overruled. Do you understand the question.

Reporter Transcript, VI, I,.,age VI-98,11. 9-18

Petitioner recalls that as the judge was cross-examining this nonparty witness, he at t.he beginning of the passage "[I]f any -- is there anything else that you can tell this Court that would cause this Court to believe what you're saying?," jumped up from his seat and walked within a few feet of the witness' desk. Petitioner contends that not only was this intimidating, but was flagrant

display of bias on the part of the hearing judge. Petitioner further observed that the hearing judge did not demonstrate this kind of behavior when questioning any of the witnesses calling by the "trial examiner."

II.

WHETHER THE PECUNIARY INTERESTS OF THE HEARING JUDGE, TRIAL EXAMINER, AND INVESTIGATOR IN THE OUTCOME OF THE PROCEEDINGS PREVENTED PETTTIONER FROM SECURING A FAIR AND IMPARTIAL HEARING

Petitioner directs the Court attention to the case entitled Plangas v. State Bar of Nevada (1981), 655 F.2d 946. That case involved a recommendation by the Nevada State Bar Board of Governor that attorneys Ross and Flangas be fined $30,000 each and suspended from the practice of law for two years for allegedly charging excessive fees in connection with a probate matter. Among other occurrences in this matter, Flangas filed a motion for a new trial and motin to file an amended complaint with the district court. He sought to add a new count to the

original complaint, charging that two of the three non-recused members of the Nevada Supreme Court were prejudice and bias towards him concerning the disciplinary proceedings. The district court granted Flangas's motion for preliminary injunction and leave to amend his complaint. The court went to opine that the Nevada Supreme Court was still biased-in-fact, despite the recusal of the two justices. The district court relied upon the holding in Gibson v. Berryhill (1978), 411 U. S. 564, 93 S.Ct. 1689, 36 L.Ed2d 488 that a state administrative body is incompetent to adjudicate a matter by virtue of pervasive bias...

Petitioner relies on the holding on the above cited case and that the State Bar Court is the alter ego of the California State Supreme Court and as such, the Supreme Court is the trier of fact and the appellate court which the California Constitution does prohibit.

CONCLUSION

Based upon the foregoing, petitioner respectfully move this Court for its recusal order.

Dated; July 22, 1995

LILLIAN B. JOHNSON
IN PROPRIA PERSONA

VERIFICATION

I, LILLIAN B. JOHNSON, am the petitioner in the within proceedings and I have read the foregoing and know its contents. The matters stated therein are true of my own knowledge, except as to those matters stated on information and belief, and as to such matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 22nd day of July, 1995, at Los Angeles, California.

LILLIAN B. JOHNSON
Declarant

ATTORNEYS

Counsel's Overreaching At Expense of Sister-in-law With Poor Health and Low Income Justifies Suspension

Cite as 95 Daily Journal D.A.R. 1058

In the Matter of

LILLIAN BROWN JOHNSON

A Member of the State Bar

No. 86-0-12794

Review Department of the State Bar Court

Filed January 23, 1995

This case involves an attorney who exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of the proceeds of a personal injury settlement obtained by the attorney-on her behalf. Respondent Lillian Brown Johnson

has requested review of the decision of the hearing department, which recommended a five-year stayed suspension, a five-year probation term on conditions including $22,910 in restitution within two years, and actual suspension for two years and until she demonstrates her rehabilitation and fitness to practice. While we modify a few of the findings of the hearing judge, we agree that two years of actual suspension and restitution constitute fitting discipline for respondent's overreaching at the expense of her sister-in-law, now deceased, [1] a woman of limited income, in poor health, who lacked sophistication in business matters.

FACTUAL FINDINGS

A. Facts as Found and Supported by the Record

Margie L. Brown, sister-in-law of respondent, was seriously injured on March 13, 1982, when a hair spray product she used ignited while she was cooking, severely burning her. Ms. Brown's injuries required her hospitalization and prevented her from working as a part-time cleaning woman for

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1 The client, Margie L. Brown, died in January 1992, after the notice to show cause was filed.

approximately one month.

Mrs. Brown retained respondent to file suit and seek other remedies on her behalf against World of Kurls, the manufacturer of the hair care product. Respondent maintained at the hearing that she had a written retainer agreement with Ms. Brown which provided for a contingent fee of 40 percent of any recovery in payment for respondent's fees if the case settled after a complaint was filed. Respondent was unable to produce a copy of this retainer agreement assertedly because of the loss of her files. (See fn. 2, post.) The hearing judge found that the contingent fee agreement was an oral one.

Respondent filed a lawsuit on Ms. Brown's behalf in the Superior Court of Los Angeles County on March 14, 1983. After answers were filed, the parties entered into settlement negotiations and in September 1986, respondent and counsel for the defendants agreed to settle Ms. Brown's case for $40,000.

The insurance company dispensing the settlement funds received a copy of a standard release form with the signature of Ms. Brown, witnessed by Earl Johnson, respondent's son. In

turn, the insurance company agreed to the unusual arrangement of electronically transferring the settlement funds directly to an account maintained by respondent. That account, noted in the insurance company records as a trust account, was in fact a personal account maintained by respondent. On or about October 14, 1986, the insurance company transferred funds to respondent's personal bank account. The designated payees on this transfer were respondent and Ms. Brown. The lawsuit was dismissed on respondent's motion on October 27, 1986.

Under the oral retainer agreement, Ms. Brown would have been entitled to receive $24,000, less $200 in estimated court costs. Respondent admitted that none of the proceeds of the settlement went to Ms. Brown. According to respondent, Ms. Brown agreed to loan her without security $19,860 from the settlement proceeds, which respondent later used as a down payment on the purchase of a residence. In addition, Ms. Brown agreed to pay $3,250 for legal services provided by respondent in two prior legal matters; $140 represented cash respondent had allegedly advanced Ms. Brown prior to the settlement, and the

remaining $750 was allegedly given to Ms. Brown in cash at the time the insurance release was executed.

In support of this accounting, respondent produced a copy of a promissory note dated September 26, 1986, executed by respondent in Ms. Brown's favor for $19,860 with 10 percent interest from January 2, 1987, payable on or before January 3, 1991. In addition, respondent produced a copy of an agreement dated September 19, 1986, signed by both respondent and Ms. Brown, in which Brown agreed to loan respondent approximately $20,000 at 10 percent interest for the purchase of real property. She agreed to pay legal fees for a prior criminal case of $2,500, and an additional $750 in fees for a damage claim filed against Ms. Brown[2], out of the World of Kurls settlement.

Respondent testified that she negotiated for the loan with

2

Respondent produced 1984 correspondence with the Allstate Insurance Company to corroborate her work on the damage claim. Respondent had no documents regarding the alleged 1980 criminal matter in Compton Municipal Court. Respondent explained that when her law practice disintegrated in 1988, between 400 and 500 of her files were placed in storage and were sold when she could not make the storage payments. She submitted a certification from the Municipal Court, Compton Judicial District, which stated that the court was not in possession of documents related to the case name and docket number provided by respondent and set forth the document destruction schedule for the court.

Ms. Brown from September 15 until the agreement was signed on September 19. Later in the hearing, she claimed that she had advised Ms. Brown that she could speak to another attorney concerning the loan transaction but did not have a written acknowledgment of this advice. Respondent testified that Ms. Brown was not interested in speaking to another attorney, was unconcerned that the loan was not secured, and was satisfied with a lump sum repayment of the loan without receiving periodic payments of principal or interest. Respondent admitted that she did not offer Ms. Brown a partial ownership interest or security interest in the real estate to be purchased with the loan proceeds. Respondent claimed Ms. Brown was willing to make the loan to respondent because Ms. Brown said she did not need the settlement proceeds immediately. Respondent also testified that she had $100,000 in accounts receivable from client fees which could have secured her loan repayment.

After presenting extensive evidence contesting the authenticity of the signatures on the loan agreement, the Office of the Chief Trial Counsel ("OCTC") withdrew from its position

that the signatures on the loan agreement and the release were not executed by the same person. After evaluating the evidence, the hearing judge concluded that OCTC failed to prove by clear and convincing evidence that the signatures of Brown on the release and on the agreement to loan respondent money were forgeries. The hearing judge also ruled that respondent had not established by a preponderance of evidence or otherwise that Ms. Brown had signed the release and the loan agreement. However, the hearing judge resolved the doubt about the validity of the documents in respondent's favor. (Karelus v. State Bar (1987) 44 Cal.3d 179, 183; Ballard v. State Bar (1983) 35 Cal.3d 274, 291.) Upon our own independent review, we conclude that the evidence submitted does not undermine the authenticity of the loan agreement and therefore find a loan was made from Ms. Brown to respondent.

As to the cash payments made to Ms. Brown, respondent could not produce cash receipts or other evidence of these payments. She contended that the $140 payment was made in early September during the week that she was negotiating for the

loan with Ms. Brown. The remaining $750 or so was her "cash out" of Ms. Brown at the time the release was signed, paid in cash from her office drawer.

The hearing judge concluded that these cash payments were never made. In support of this conclusion, the hearing judge outlined what he characterized as the "many suspicious and unexplained circumstances relating to Respondent's dealings with Brown." (Decision at p. 18.) He recounted respondent's varying versions of the time, place and amount of the cash payments. He noted that respondent claimed that she had made these cash distributions just prior to and after the settlement negotiations concluded, and that they were in amounts which served to exculpate respondent from charges that she misappropriated or mishandled entrusted funds. The cash distributions were not mentioned in the loan agreement or promissory note, nor were they corroborated by any other evidence. Finally, even if respondent's assertion that she advanced $140 to Ms. Brown at the time she executed the promissory note is accepted as true, Ms. Brown's alleged plea for cash contradicts respondent's claim

that Ms. Brown did not need the settlement funds immediately. We agree that respondent did not establish that she advanced any monies to Ms. Brown before the settlement proceeds were wired.

Respondent was unable to repay the loan in full to Ms. Brown when it came due. She claimed she gave Ms. Brown between $800 and $1,000 in cash before her law firm disintegrated in 1988. These payments were allegedly made during lunchtime visits with Ms. Brown after respondent had made morning court appearances. Respondent could not produce any receipts. The hearing judge concluded that the evidence was insufficient to show that respondent repaid any funds to Ms. Brown. We agree.

Respondent also failed to make her mortgage payments on the house purchased with the funds provided by Ms. Brown and the house was lost to foreclosure in 1989. After Ms. Brown died, respondent made no effort to locate the heirs or make any payments on the loan.

The hearing judge concluded that respondent had violated

Business and Professions Code section 6106 [3] by misappropriating the entire settlement under egregious circumstances and misrepresenting to the insurance company that it was to wire funds to her trust account when it was in fact her personal account. He determined that she had violated former rule 8-101[4] in having the settlement funds wired to her personal account. He also found that she had entered into a business transaction with a client without complying with the requirements of former rule 5-101. Finding that respondent lacked candor toward the court, was indifferent to rectifying the harm caused by her misconduct, caused significant harm to her client and had little mitigating evidence beyond the lack of a prior record, the hearing judge recommended a five-year stayed suspension, a five-year probation term, and actual suspension for two years and until respondent demonstrated her rehabilitation at a hearing

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3 Except as noted, all further references to sections are to the Business and Professions Code.

4 All references in this opinion to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

pursuant to standard 1.4(c)(ii),

Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V ("stds.").) He also recommended that respondent be required as a probation condition to make restitution of $22,910 plus interest to Ms. Brown's estate or heirs within two years.

B. Modifications to Factual Findings

We have two modifications to the facts as found by the hearing judge. Respondent testified that when she negotiated for a wire transfer of the settlement funds, she did not represent to the insurance company that the funds would be wired to a trust account. While the hearing judge did not find respondent credible in most respects, the only evidence to rebut her testimony was a notation in the insurance company records that the account was a trust account. Disbelieving respondent does not create evidence to the contrary. (In the Matter of DeMassa (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.) The notation may reflect the insurance company employee's own assumption about the nature of the account, since in the normal course of

business, such a transaction would involve a trust, rather than a personal account. However it alone does not establish that it resulted from a misrepresentation by respondent to the company. Therefore we modify the factual findings and conclusions to conclude that there is no clear and convincing evidence that respondent misled the insurance company about the nature of the bank account.

As to the attorney's fees authorized under the agreement for prior legal work, the hearing judge concluded that the $2,500 set off for attorney's fees allegedly performed for a criminal case in 1980 was improper because respondent did not prove that the criminal case ever existed. The hearing judge did not consider respondent's evidence sufficient to establish that the criminal case ever existed. The State Bar investigator who did a criminal records search in the Municipal Court in Compton failed to uncover any criminal court file relating to Ms. Brown.

Considering the age of the criminal case (1980), it is not surprising that the State Bar was unable to locate a record concerning the criminal matter when it sent its investigator to the

Compton Municipal Court. However, the testimony of an investigator is far from the best evidence on the contents of court records. Testimony or sworn evidence from the court clerk responsible for the records is more germane and reliable on this issue. Here, the court clerk's certification of document destruction (see fn. 2, ante) casts doubt that the municipal court had retained any case files more than 10 years old.

Nevertheless, Ms. Brown agreed in the loan agreement to pay for legal fees for prior cases out of the settlement funds. The lack of corroborative evidence as to the criminal case is therefore immaterial. Respondent was entitled under the agreement to take her attorney's fees for these prior cases and we so find.

DISCUSSION

A. Due Process claims

As a preliminary matter, respondent argues the decision violates due process on two grounds. First, respondent contends that testimony by Ms. Brown's daughter, Sandra Brown, describing her mother's injuries from the accident which sparked the lawsuit against World of Kurls, prejudiced the

hearing judge. Respondent argues that the testimony was introduced to inflame the emotions of the hearing judge and it improperly influenced his ultimate decision.

In response, OCTC cites to our analysis in In the Matter of Hertz (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469. Hearing judges are accorded wide latitude to receive all relevant evidence and actual prejudice must be established before a party is entitled to relief. OCTC argues that respondent has not demonstrated any prejudice resulting from the testimony.

From an independent review of the record, we do not find that the hearing judge was prejudiced by Sandra Brown's testimony concerning her mother's injuries.

In addition, respondent claims she was denied due process because she was not permitted to recall and examine OCTC witnesses Lucerne Middlebrook and Carolyn Porter. At the completion of Ms. Porter's testimony on April 29, 1993, respondent asked the hearing judge to place Ms. Porter on call and the hearing judge so ordered. A similar request was made to the judge after the close of Mr. Middlebrook's testimony but that

request was denied and the witness was excused. In both instances, the alternative of having respondent subpoena these witnesses was discussed. At a later point in the trial, respondent moved to have Ms. Porter and Mr. Middlebrook recalled to the stand. The hearing judge denied both motions; in the first instance, because Mr. Middlebrook had been excused, and regarding the second witness, because respondent had failed to subpoena Ms. Porter when respondent learned prior to that day's hearing that OCTC could not produce Ms. Porter.

OCTC argues that the hearing judge excused Mr. Middlebrook after his testimony and thus there is no procedural error. That is consistent with Evidence code section 778, which provides that, "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

However, Ms. Porter was placed "on call" and not excused from giving further testimony in the matter. Respondent's purpose for recalling Ms. Porter was to examine her

concerning a power of attorney allegedly executed by Ms. Brown in 1991, a document which respondent did not possess at the time Ms. Porter originally testified. The additional testimony was relevant only to authenticate the signature as Ms. Brown's and did not relate to the validity of the transactions at issue in the case. OCTC has abandoned its argument that the signatures on the documents in question were forgeries. Therefore, while respondent was entitled to have Ms. Porter recalled, there is no prejudice resulting from the judge's decision not to order the witness recalled.

B. Improper Business Transactions - Rule 5-101

Respondent challenges all the culpability findings, contending that they are not supported by sufficient credible evidence. She does not address specifically the facts underlying the violation of former rule 5-101.

The rule required that the terms and conditions of the loan had to be fair and reasonable to Ms. Brown, that they be explained in terms that she understood, that she be advised by respondent to seek the advice of independent counsel concerning

the terms of the loan, and that Ms. Brown consent to the transaction in writing. A loan from a client to an attorney, like any attorney-client business transaction, is "scrutinized with the utmost strictness for any unfairness." (Rodgers v. State Bar (1989) 48 Cal.3d 300, 314, citing Beery v. State Bar (1987) 43 Cal.3d 802, 812-813.) The burden is on the attorney to demonstrate that the dealings with the client were fair and reasonable. (Hunniecutt v. State Bar (1988) 44 Cal.3d 362, 372-373; In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 745.) A violation of any portion of rule 5-101 is sufficient to constitute misconduct. (Read v. State Bar (1991) 53 Cal.3d 394, 411.)

The terms and conditions of the loan were clearly unfair. This is a situation when security would ordinarily be considered essential to the client and thus an unsecured loan under these circumstances is an indication of unfairness. (Hunniecutt v. State Bar, supra, 44 Cal.3d at p. 373; In the Matter of Hagen (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 164.) The loan did not provide for any payments other than a lump sum payment in

January 1991, which was again unreasonable, considering the financial circumstances of the client. (See, e.g., Rose v. State Bar (1989) 49 Cal.3d 646, 662.) Nor did respondent describe such possible terms as the assignment of a security interest or other lien against the real property which respondent acquired with the loan proceeds, as options that could have safeguarded Ms. Brown's interests.

We agree with the hearing judge's conclusion that Ms. Brown's written consent to the transaction was not a knowing one because Ms. Brown was incapable of giving informed consent and her incapacity was known to respondent. Respondent was obligated to insure that the terms and conditions of the loan were fully known and understood by Ms. Brown. (Hunniecutt v. State Bar, supra, 44 Cal.3d at pp. 372-373, citing Clancy v. State Bar (1969) 71 Cal.2d 140,. 146-147.) Ms. Brown's poor health, frequent use of alcohol, lack of sophistication in business matters, and limited education were all evident to respondent (her sister-in-law) and undermined respondent's claim that she had obtained Ms. Brown's informed

consent to the loan. The hearing judge also disbelieved respondent when she claimed to have advised Ms. Brown to seek independent counsel. Respondent was obligated to go beyond informing Ms. Brown that she had a right to consult another attorney and was required to advise her to do so. (Rose v. State Bar, supra, 49 Cal.3d at p. 663.) Respondent was clearly overreaching.

We will also consider the conditions under which respondent secured the loan from Ms. Brown as grounds for discipline as an act of moral turpitude under section 6106.

C. Section 6106 - Moral Turpitude

The hearing judge found that respondent violated section 6106 in five respects: (1) she misrepresented to the insurance company that the bank account for the wire transfer was a trust account; (2) she charged her client for legal fees in a criminal case which did not exist; (3) she misappropriated the proceeds of a loan to which she was not entitled; (4) she misappropriated the balance of settlement funds that she claimed to have paid out in cash to her client; and (5) she obtained the loan in a manner "so

egregious and so abusive of her obviously vulnerable client as to constitute moral turpitude." (Decision at p. 16.) Respondent contests all five findings by the hearing judge. We have rejected the first two bases of culpability by our modifications to the judge's factual findings. After reviewing the Supreme Court's opinions in this area, we also reject the finding that respondent misappropriated the loan proceeds. We do find ample evidence for concluding that respondent's procurement of the loan and retention of the balance of the settlement funds constituted acts of moral turpitude and dishonesty.

Both the hearing judge and OCTC conclude that the finding of improprieties committed by respondent in securing this loan means that respondent must have misappropriated the loan proceeds. There is no case law that an improper transaction under former rule 5-101 automatically converts the attorney's acquisition of the funds as part of the transaction into a misappropriation. OCTC compares it to the retention of client property under circumstances that were neither reasonable nor honest, citing In the Matter of Harris (Review Dept. 1992) 2 Cal.

State Bar Ct. Rptr. 219, 229-230. In Harris, the attorney borrowed computer equipment from the client and refused to return it upon the client's request, claiming it to be a part of her attorney's fees. She was found to have converted the equipment, in violation of section 6106. Here, respondent had a claim of right to the bulk of the funds under the loan agreement signed by the client. The fact that the negotiation and final terms of the loan breached respondent's duties did not invalidate the underlying transaction. We find that respondent's failure to repay the loan does not constitute theft; rather, her default aggravated the harm already suffered by respondent's client.

Indeed, there are a number of cases in which an attorney violated rule 5-101 by improperly soliciting a loan or investment from a vulnerable client on the heels of the client's receipt of a large settlement where misappropriation was not found. (See Rose v. State Bar, supra, 49 Cal.3d at p. 663; Hunniecutt v. State Bar, supra, 44 Cal.3d at pp. 372-373, Beery v. State Bar, supra, 43 Cal.3d at pp. 811-812.) In all three cases, restitution was ordered to ameliorate the harm caused by the misconduct.

In Rose, the attorney persuaded a young widow with two young children to invest $70,000 in a franchise restaurant equipment business in which the attorney was also a shareholder. The Court found that the attorney had failed to disclose the substantial risks of such an investment to the client, a person with virtually no business experience and limited financial resources apart from the settlement funds, and failed to advise her to seek independent counsel. Finding additional misconduct in four other client matters involving improper solicitation, incompetent practice, and trust fund violations, as well as evidence of mitigation, the Supreme Court ordered a two-year actual suspension.

In Hunniecutt, the attorney persuaded the client to loan the entire $5,000 settlement from a personal injury action to the attorney to invest in a real estate venture and later converted the transaction into an unsecured loan. The Court discussed the special trust this client placed in the attorney as a result of the personal injury litigation and concluded that because of the unfairness of the business transaction, violations of rule 5-101

and section 6106 had occurred. Considering mitigation evidence, including efforts to repay the client and to alter his practice to avoid a recurrence, the Court ordered a 90-day actual suspension.

In Beery, the attorney persuaded a client who had suffered an injury leaving him paralyzed below the waist, and who was unsophisticated in financial matters, to invest $35,000 of the proceeds of his personal injury settlement in a satellite venture. The attorney did not disclose either his relationship with the satellite company or its financial condition, did not advise the client to seek independent advice concerning the investment, and defaulted on his personal guarantee to repay the loan. The Court found that it was not an arms-length business deal, material facts were concealed, and the attorney had abused the trust reposed in him by the client. The Court ordered a two-year actual suspension.

However offensive respondent's actions were, they did not transform an improper business transaction into a misappropriation. We find that respondent did not steal the majority of the settlement proceeds, contrary to section 6106, but

obtained them pursuant to a loan transaction which otherwise violated respondent's duties to her client.

Nevertheless, the misconduct here violated section 6106 as an act of moral turpitude on other grounds. As noted by the Court in the Beery case, "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. (Beery v. State Bar, supra, 43 Cal.3d at p. 813, quoting Barbara A. v. John G.(1983) 145 Cal-App.3d 369, 383.) The fairness and reasonableness of a business transaction between an attorney and client go to the core of whether such overreaching constitutes moral turpitude. (Hunniecutt v. State Bar, supra, 44 Cal. 3d at p. 372.) As we stated earlier, the loan provisions were grossly unfair to Ms. Brown. As an attorney and a close family member, respondent exploited her superior knowledge and position of trust to the detriment of her vulnerable client and this clearly constituted an act of moral turpitude.

Respondent had no valid claim to the $700 which remained from the settlement, money which respondent claimed to have advanced to Ms. Brown out of her cash drawer. Respondent's misappropriation of those funds was an act of dishonesty and moral turpitude as well.

D. Commingling and Prompt Payment - Rule 8-101

Respondent contends that she did not violate former rule 8-101(A) in that all the funds had changed character from trust funds into personal funds prior to her receipt thereof. As a result of the respondent's agreement with Ms. Brown, all but approximately $700 was attributable to attorney's fees owed to respondent, costs owed to her or the loan. Nevertheless, since there was a mixed character to the funds, respondent was obligated to place the settlement proceeds into her trust account and thereafter dispense the $700 owed to her client promptly. There is no doubt that Ms. Brown made a demand for funds. Respondent's failure to place the settlement proceeds in a trust account and to pay the remainder promptly to Ms. Brown violated the trust account rules.

RECOMMENDED DISCIPLINE

A. Mitigation and Aggravation

Respondent argued in mitigation her long record of practice without prior discipline. (11 years prior to the misconduct in 1986), her close familial relationship with Ms. Brown, and the financial setbacks which she suffered as a result of the disintegration of her law firm in 1988. She has also moved to augment the record on review to include evidence concerning her pro bono activities,[5] and argues that the lack of any additional charges of misconduct filed against her from the time of this incident to the present should be given some mitigating weight. Respondent claimed that she had not located a file which contained the documentation regarding her pro bono work until she was preparing for review proceedings. Since respondent has

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5 Respondent originally submitted this evidence in her post-oral argument brief filed on July 29, 1994. OCTC moved by motion filed September 1, 1994, to strike the additional evidence sought to be admitted. Respondent filed an opposition to the motion to strike on September 12, 1994, as well as a separate motion to augment the record on review. OCTC opposed the augmentation request in papers filed on September 20, 1994. Respondent filed a supplemental declaration in support of her augmentation motion on September 29, 1994, and OCTC filed its response on September 30, 1994. The case was submitted on September 30, 1994.

not established good cause why the documentary evidence in her possession could not have been presented below, we decline to consider it. (See In the Matter of Frazier (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 686-687.)

Her years of practice without incident and the lack of any charges filed since this case are mitigating circumstances. Respondent's financial reversal could explain her inability to repay the loan or attempt any restitution to the heirs. However, since the reversal postdates the loan, it cannot be considered as mitigation of the misconduct itself. The fact that respondent's misconduct involved a family member does not constitute a mitigating circumstance. In Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310, the attorney paid his own personal expenses, as well as those authorized by his client, a close personal friend, from the client's funds in trust, resulting in a misappropriation. The Court rejected the claim that the attorney's personal relationship with the client and the lack of any intent to harm the client were mitigating. Here, respondent's family ties to her client, her sister-in-law, made respondent all the more aware of the client's

vulnerabilities and the considerable trust the client placed in respondent. Rather than honoring that trust, respondent exploited it for her own benefit and to the harm and detriment of the client. The familial relationship here is not a mitigating circumstance; it is an aggravating one.

There is other aggravating evidence in this case. Respondent's misconduct involved multiple acts of wrongdoing, and significantly harmed her client. She showed indifference towards rectifying or atoning for her misconduct and had failed to make any attempt to repay the loan, or to contact the heirs. The hearing judge's decision is replete with examples of respondent's lack of candor at the hearing. The carelessness with which respondent lost control of between four and five hundred case files when her practice closed raises grave doubts about her ability to protect the interests of other clients as well.

B. Discipline Recommendation

We consider the cases involving improper business transactions with clients to be of greatest relevance in fashioning a discipline recommendation. After reviewing the parties' briefs

and the cases cited therein, the cases discussed in this opinion, the applicable standards,[6] and the aggravating and mitigating evidence, we adopt the substance of the hearing judge's recommendations for discipline, with two modifications of the probation conditions he proposed. We find that a five year stayed suspension, a five-year probation term including restitution within two years, and actual suspension for two years and until respondent demonstrates her rehabilitation and fitness to practice is consistent with prior attorney discipline cases of gross overreaching amounting to moral turpitude, which also contain substantial aggravating circumstances and little evidence in mitigation. (See Rodgers v. State Bar supra, 48 Cal.3d 300 [two-years actual suspension for improper loan in violation of rule 5-101 coupled with dishonesty and intentional concealment of the loans from the probate court and opposing counsel. Beery v.

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[6] Under standard 2.3, discipline for acts of moral turpitude includes actual suspension or disbarment, depending on the extent of the harm to the victim, the magnitude of the act, and its relationship to the practice of law. Misappropriation of small amounts of entrusted funds or other violations of trust account rules requires a minimum three-month actual suspension, under standard 2.2. The recommended sanction under standard 2.8 for an improper business transaction with a client is suspension, unless the misconduct and harm are minimal.

State Bar, supra, 43 Cal. 3d 802 (two year actual suspension for rule 5-101 and section 6106 violations, including concealing material facts from client regarding loan].)

The two modifications to the probation conditions are modifications of the restitution requirement. First, the restitution amount should be modified to require restitution of $20,550, plus 10 percent interest per annum from October 14, 1986, consistent with our finding that respondent was entitled to retain a portion of the settlement for prior legal services rendered. We also modify the terms of probation to recommend that respondent be ordered to remain on actual suspension for two years and until she provides proof of completed restitution to Ms. Brown's estate or heirs as prescribed by the hearing judge, as well as making the required showing pursuant to standard 1. 4 (c)(ii). We adopt the remainder of the hearing judge's discipline recommendation, as modified, including the requirements that respondent pass the California Professional Responsibility Examination prior to the expiration of her actual suspension, that she comply with the provisions of rule 955, California Rules of Court, and that she

pay costs as ordered by the Supreme Court.

PEARLMAN, P.J.

We Concur:

NORIAN, J.

STOVITZ, J.

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THE STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	Case No. 86-0-12794
LILLIAN BROWN JOHNSON	FIRST AMENDED NOTICE TO SHOW CAUSE

No. 64247

A Member of the State Bar

TO: LILLIAN BROWN JOHNSON, Respondent herein:

IF YOU FAIL TO FILE AN ANSWER TO THIS

NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, YOU MAY BE ENROLLED AS AN INVOLUNTARY INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNTIL AN ANSWER IS FILED.

You were admitted to the practice of law in the State of California on June 27, 1975. Pursuant to rule 501, Transitional Rules of Procedure of the State Bar of California, reasonable cause has been found to conduct a formal disciplinary hearing-commencing at a time and place to be fixed by the State Bar Court (NOTICE OF TIME AND PLACE OF HEARING WILL BE MAILED TO YOU BY THE STATE BAR COURT CLERK'S OFFICE), by reason of the following:

COUNT ONE

Case No-89-0-14511

1. On or about 1981, you were employed by Margie Brown (hereinafter "Brown") to represent her in a personal injury matter.

2. In or about October 1986, you settled your client's matter for Forty Thousand Dollars ($40,000.00). On or about October 14, 1986, the insurance carrier wired the Forty Thousand ($40,000.00) to your personal bank account. Thereafter, you misappropriated the settlement funds to your own use and purpose.

3. In or about November, 1988, one of Brown's medical providers, Dr. John Olson, contacted you concerning an outstanding medical lien. You misrepresented to Dr. Olsen's office manager that Brown's case was still pending. You failed to honor Dr. Olsen's medical lien. You failed to competently perform the services for which you were employed.

You committed the above-described acts in wilful violation of your oath and duties as an attorney under disciplinary case law and/or section 6106 of the California Business and Professions Code, and former rules 6-101(A) (2), 8-101(A) and 8-101(B)(I) of The Rules of Professional Conduct.

WITHIN TWENTY (20) DAYS after service of this Notice to Show Cause, you shall file a written answer as provided

in rule 522, Transitional Rules of Procedure of the State Bar of California.

NOTICE - DEFAULT PROCEDURE!

YOUR DEFAULT MAY BE ENTERED FOR FAILURE TO FILE A WRITTEN ANSWER TO THIS NOTICE WITHIN TWENTY (20) DAYS AFTER SERVICE AS PRESCRIBED BY RULE 552, TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR. SHOULD YOU TIMELY FILE AN ANSWER, YOUR DEFAULT MAY ALSO BE ENTERED FOR FAILURE TO APPEAR AT THE FORMAL HEARING. THE ENTRY OF YOUR DEFAULT MAY RESULT IN THE CHARGES SET FORTH IN THIS NOTICE TO SHOW CAUSE BEING ADMITTED AND DISCIPLINE RECOMMENDED OR IMPOSED BASED ON THOSE ADMITTED CHARGES. IF YOUR DEFAULT IS ENTERED, YOU WILL LOSE THE OPPORTUNITY TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS AND UNTIL YOUR DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED GROUNDS. SEE RULE

552 ET. SEQ., TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-INACTIVE ENROLLMENT!

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, THAT YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULES 550 AND 560, TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-COST ASSESSMENT!

IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN

THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 460 ET. SEQ., TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

OFFICE OF TRIAL COUNSEL

THE STATE BAR OF CALIFORNIA

Dated: November 2, 1992 BY:_____

RACHAEL M. BIN